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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1848

DORCAS BOND and BARBARA BALDWIN,

Petitioners,

—v.—

BENEFICIAL FINANCE COMPANY OF NEW YORK, INC. and PROTECTIVE LOAN CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Dorcas Bond and Barbara Baldwin respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on March 13, 1974, rehearing of which was denied March 29, 1974.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix, *infra,* p. 62. The order denying the petition for rehearing appears in the appendix, *infra,* p. 84. The opinion of the District Court for the Northern District of New York is reported at 362 F. Supp. 1373 (N.D.N.Y. 1973) and appears in the appendix, *infra,* p. 32.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 13, 1974. A timely petition for a rehearing with a suggestion for rehearing *en banc* was denied on March 29, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Did the respondent finance companies deny petitioners due process when they enforced New York's wage assignment statute, which, without affording petitioners a prior hearing, compelled their employers to pay part of their wages directly to the finance companies?

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the Constitution of the United States, and New York Personal Property Law, Art. 3-A, §§46-49. The statute is set forth in the appendix, *infra*, p. 13.

Statement

The Facts

Petitioner Bond is a wage earner residing in Albany, New York. On June 7, 1968, she obtained a loan from a branch office of respondent Beneficial Finance Company, in order to purchase a washing machine. Beneficial's standard form loan agreement included a wage assignment tailored to New York Pers. Prop. Law §§46-49. In September, 1970,

claiming a default, Beneficial served her employer, the Commission on Economic Opportunities, with a wage assignment. The finance company did not institute a suit or afford Bond any prior hearing to allow her to challenge the alleged debt, nor did the statute require affording such a hearing.

Petitioner Baldwin obtained a loan from Protective Loan Corporation in May, 1967. In September, 1970, Protective served a wage assignment on her employer, who then turned over 10% of her wages despite her contention that the assignment had been fraudulently induced. Enforcement of the assignment reduced her take-home pay to less than $50 per week.[1]

On October 12, 1970, petitioners filed the present action in the United States District Court for the Northern District of New York seeking a declaration that the law effects the unconstitutional denial of due process, and an injunction against its enforcement by respondents. On July 25, 1973, the district court granted petitioner's motion for summary judgment. On appeal, the Second Circuit reversed, holding that no state action was involved. Chief Judge Irving Kaufman dissented. A petition for hearing was denied, three judges dissenting.

The Statutory Plan

The statute provides that wage assignments proper in form "shall be collectible" from employers (§§48-a, 46-b) and requires that the assignments themselves contain summaries of several sections of the statute (§46-c). To enforce a wage assignment, a finance company must first file

[1] Pending the outcome of this litigation, collection of both wage assignments has been suspended by agreement of the parties.

it with the county clerk, who receives a fee and maintains an indexed file of assignments (§§47, 47-a, 47-b, N.Y.C. P.L.R. §8021 (b) (3)). The company then serves the assignment on the alleged debtor (§48) and on the employer (§48-a). The employer must pay the company 10% of the wages due each pay period (§48-a).

A finance company posts no bond to protect an alleged debtor. It need not institute an action against him either before taking the wages or at any later time. Before 1974, the debtor could obtain a hearing only by assuming the burden of going forward in court, initiating a lawsuit under §47-e.[2]

In 1974, the legislature provided a second method for some debtors to contest claims (S. 8844-A/A. 10652-A, at this writing not yet signed by the Governor, but expected to be signed, and reprinted in Appendix to this petition). Under amended §48, a finance company must mail to the alleged debtor a notice informing him that, by return certified mail within ten days, he can "affirm" that he has a "bona fide defense to the claim . . . and to the wage assignment . . . based on the following facts (state the facts constituting the basis of your defense)." The creditor's receipt of the debtor's notice requires him to get a court order to enforce the assignment.

The new amendment does not render respondents' actions constitutional, justify the decision below, or render the issue unimportant:

(1) It does not apply to the wage assignments that respondents seek to enforce against petitioners.

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[2] To do so he had to pay filing fees of up to $10.50. N.Y.C.P.L.R. §§8018(a), (c), N.Y. Civil Ct. Act §1911 (b).

(2) It does not apply to banks, trust companies or credit unions (amended §49).

(3) The new provisions do not satisfy due process because they require the alleged debtor to claim (indeed, "affirm") an affirmative defense, and to disclose its details; under both the old §47-e procedure and the new procedure, the debtor loses his right to require his creditor to go forward with his proof, and to dispute the *amount* owing even if he has no defense on the merits. See *Fuentes* v. *Shevin*, 407 U.S. 67, 87 n. 17 (1972).

(4) Even if the new procedure might satisfy due process, the Court of Appeals' state action decision would still require reversal, with a remand to consider the due process issue which it did not reach.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to consider a problem of national importance: creditors are using wage assignments to evade the constitutional safeguards of *Sniadach*.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), this Court ruled that the Constitution prohibited *ex parte* wage garnishment. Just one year after the *Sniadach* decision, two major credit publications were urging their readers to consider wage assignments "if the new limitations on garnishment seem to make it an unsatisfactory way" to extract money from consumers. *Consumer Credit and Truth-in-Lending Compliance Report*, v. 1, No. 9, p. 4 (July 1970), citing *Prentice-Hall Consumer and Com-*

mercial Credit Reporter. This case is here because finance companies are indeed using wage assignment laws to circumvent the principle of *Sniadach.*

The mechanics of the two procedures are virtually identical. State law requires the employer to pay over part of the consumer's wages to a finance company without requiring the company to prove to any judge even that a default has occurred, and without providing any prior opportunity for the employee to contest the validity of the underlying debt or of the assignment. The legal formalities of assignments and garnishments differ only in that (1) the debtor signs the assignment as a condition of the loan,[3] and (2) although the county clerk files a copy of the assignment, he does not issue it; the creditor himself serves it on the employer.

The results of the two procedures are also identical. Enforcement of a wage assignment, like execution on a prehearing garnishment, produces "leverage of the creditor on the wage earners [that] is enormous" which "may as a practical matter drive a wage-earning family up to the wall," *Mitchell* v. *W. T. Grant Co.*, —— U.S. ——, 42 U.S. L.W. 4671, 4676 (May 14, 1974). To a disproportionate extent, the affected families in New York's cities are poorly educated, low-income blacks and Puerto Ricans who can least afford to lose the wages involved and are least likely

[3] In terms of fact, "defendants' wage assignment agreements do not even purport to waive a hearing on default or to waive any defenses to the fundamental validity of the debt, much less to qualify as a waiver under the Constitution. I find no grounds in law or fact to seriously argue that there has been a waiver." Opinion of the District Court, *infra* at p. 59.

to understand why they are losing their money without a day in court.[4]

Furthermore, *ex parte* wage assignments are the routine method by which New York finance companies collect alleged debts; lawsuits are the rare exception.[5]

Creditors' use of wage assignments to bypass the courts is not confined to New York. Only twenty-one jurisdictions have prohibited all wage assignments; more than thirty permit them for sales, for loans, or for both.[6] The decision below provides jurisprudential support for this self-help collection device throughout the country.

II.

Certiorari should be granted to resolve a conflict among the Circuits.

The Second Circuit's holding conflicts with *Hall* v. *Garson,* 430 F.2d 430 (5th Cir. 1970). *Hall* held that a landlord who, without a hearing, seized the personal goods

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[4] See the empirical study of wage assignments in New York in the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., filed April 17, 1973 in Albert v. Household Finance Corp., No. 72 Civ. 4651 (S.D.N.Y.). At first blush it might appear that debtors could not have defenses to loan claims, and therefore need no day in court. But even putting aside such exotic defenses as usury, fraud and truth-in-lending violations, disputes as to the amount owed are very common, resulting from computer billing errors.

[5] A study by counsel of wage assignments in Sullivan County, New York, showed that between 1957 and 1973, Household Finance Co. filed 263 wage assignments. But since 1951, it filed only 14 actions at law in that county, all of them involving persons against whom wage assignments would have been useless (e.g., because the defendants were unemployed). See brief in opposition to motion to dismiss Albert v. Household Finance Corp., *supra.*

[6] See the compilation of state wage assignment laws in 1 CCH Consumer Credit Guide ¶650 (1974).

of an allegedly indebted tenant, pursuant to a state statute, was engaging in state action. Though no state official performed even a ministerial act, the landlord's seizure was under color of law because the "execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien has in Texas traditionally been the function of the Sheriff or constable." 430 F.2d at 439.

In New York, the power of adjudication normally lies in the courts, and the power of execution against income has traditionally been vested in the county sheriffs. New York Judiciary Law, and N.Y.C.P.L.R. §5231 (b), (c). Under the assignment statute, both of these powers are transferred to the creditor who unilaterally determines that a debt is valid and owing, and who takes unrestricted control of all wages he seizes pursuant to the assignment. The Second Circuit, unlike the Fifth, ruled that these delegations of traditional governmental powers did not make a creditor's use of the statute an exercise of state action. The Second Circuit's holding on state action is also inconsistent with several district court decisions finding state action in the private, self-help enforcement of statutory liens running in favor of creditors. *Lee* v. *Cooper,* Civ. Action No. 74-104 (D. N.J. March 21, 1974) (repairman's lien); *Ford* v. *Dean's O.K. Tire Store, Inc.,* 2 O.E.O. Pov. L. Rep. ¶16,856 (D. Nev. 1973) (garageman's lien); *Klim* v. *Jones,* 315 F. Supp. 109 (N.D. Calif. 1970) (innkeeper's lien); *Straley* v. *Gassaway Motor Co.,* 359 F. Supp. 902 (S.D. W. Va. 1973) (repairman's lien).

III.

Enforcement of the wage assignment statute is state action.

The Second Circuit attempted to distinguish this case from *Sniadach, supra,* and *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), on the ground that there is no direct participation here by any state official--no court clerk issues a wage assignment summons or executes a wage assignment writ. Nevertheless, state action is present in three ways.

First, the wage assignment law does not merely authorize a consensual private agreement. It compels a third party, the employer, to cooperate with the creditor regardless of his own desires. In the early 1930's, employers and employees were agreeing, in their employment contracts, that wages were non-assignable, and that purported assignments were void. See Fortas, "Wage Assignments in Chicago: *State Street Furniture Co.* v. *Armour and Co.,*" 42 *Yale L.J.* 526 (1933).[7] Before the enactment of New York's statute, this private nullification of wage assignments was valid. *Sacks* v. *Neptune Meter Co.,* 144 Misc. 70, 258 N.Y.S. 254 (App. Term 1932), aff'd 238 A.D. 82, 263 N.Y.S. 462 (1st Dept. 1933). But the 1934 New York law destroyed this contractual right under the common law by mandating that assignments written in the form required by the statute "shall be collectible." Ch. 738 of the Laws of 1934, §1. By compelling employers

[7] Employers desired such agreements because of the high cost of processing sporadic payroll deductions: an average of $19.40. See Eric Werner Single, Sociological Aspects of Debt Entanglement, unpublished doctoral thesis, filed at Columbia University, New York, New York (1973) at 231-44.

to turn over wages without a prior hearing, New York has vested its finance companies with a state-created power, similar to that conferred in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).

Second, state action is present because New York delegates to creditors sovereign functions of adjudication and execution. As Chief Judge Irving Kaufman stated in his dissent below, "[w]hen a finance company unilaterally determines that the assignor-debtor is in default, the essential predicate for triggering the wage assignment mechanism—and then takes the drastic step of seizing a significant property interest without the consent of the holder—it is performing an adjudicative function which is a fundamental component of the role of government in our society." And the state has delegated to creditors a second public function as well—that of executing against income. See N.Y.C.P.L.R. §5231(b), (c).

Third, the Court of Appeals claimed that "[n]o one has cited here nor have we found any case in this State which, prior to enactment of [this law], found that the assignment was unenforceable unless the debt were first judicially established." But in fact, at common law, a creditor could not use wage assignments to execute on wages due from a job that the debtor did not have at the time the wage assignment was signed. *Jules-Wallace & Co.* v. *R. A. Mgt., Inc.*, 148 Misc. 180 (App. Term 1933). Once the debtor had taken a new job, the creditor had only an equitable lien which he had to sue to enforce. Personal Property Law §48-c reversed this feature of the common law, gave creditors greater power than they previously had, and altered the outcome for petitioner Bond, who was not employed in 1968 (when she signed the assign-

ment) by the same employer who was served with the assignment in September 1970.[8]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.[9]

Respectfully submitted,

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Counsel acknowledge with gratitude the assistance of Julie O'Keefe and Jonathan D. Warner in the preparation of this petition.

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[8] This issue was argued but ignored by the court below. See appellee's [petitioner's] brief in the Court of Appeals, p. 10, n. 7.

[9] We suggest that the case be consolidated for argument with the self-help repossession cases which counsel understands are about to be docketed in this Court: Adams v. Southern California National Bank, —— F.2d —— (9th Cir.), 42 U.S.L.W. 2230 (October 4, 1973), rehearing denied March 12, 1974; Shirley v. State Natl. Bank of Connecticut, —— F.2d ——, 42 U.S.L.W. 2463 (2d Cir. February 14, 1974), rehearing denied March 29, 1974; Nowlin v. Professional Auto Sales, —— F.2d ——, Nos. 73-1348, 73-1450 (8th Cir. April 25, 1974). These cases raise a similar issue of state action, but wage assignment statutes present the additional issue, not present in the repossession cases, of statutory compulsion of third-party employers.